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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 462

WASHINGTON PUBLIC POWER SUPPLY SYSTEM,
*Petitioner,*

*v.*

FEDERAL POWER COMMISSION, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR RESPONDENT PACIFIC NORTHWEST POWER COMPANY IN OPPOSITION

HUGH SMITH
1400 Public Service Building
Portland, Oregon

FRANCIS M. SHEA
WILLIAM H. DEMPSEY, JR.
RALPH J. MOORE, JR.
JOHN R. KRAMER
734 Fifteenth Street, N.W.
Washington, D.C.

*Attorneys for respondent*
*Pacific Northwest Power Company*

*Of Counsel:*

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C.

RIVES & ROGERS
1400 Public Service Building
Portland, Oregon

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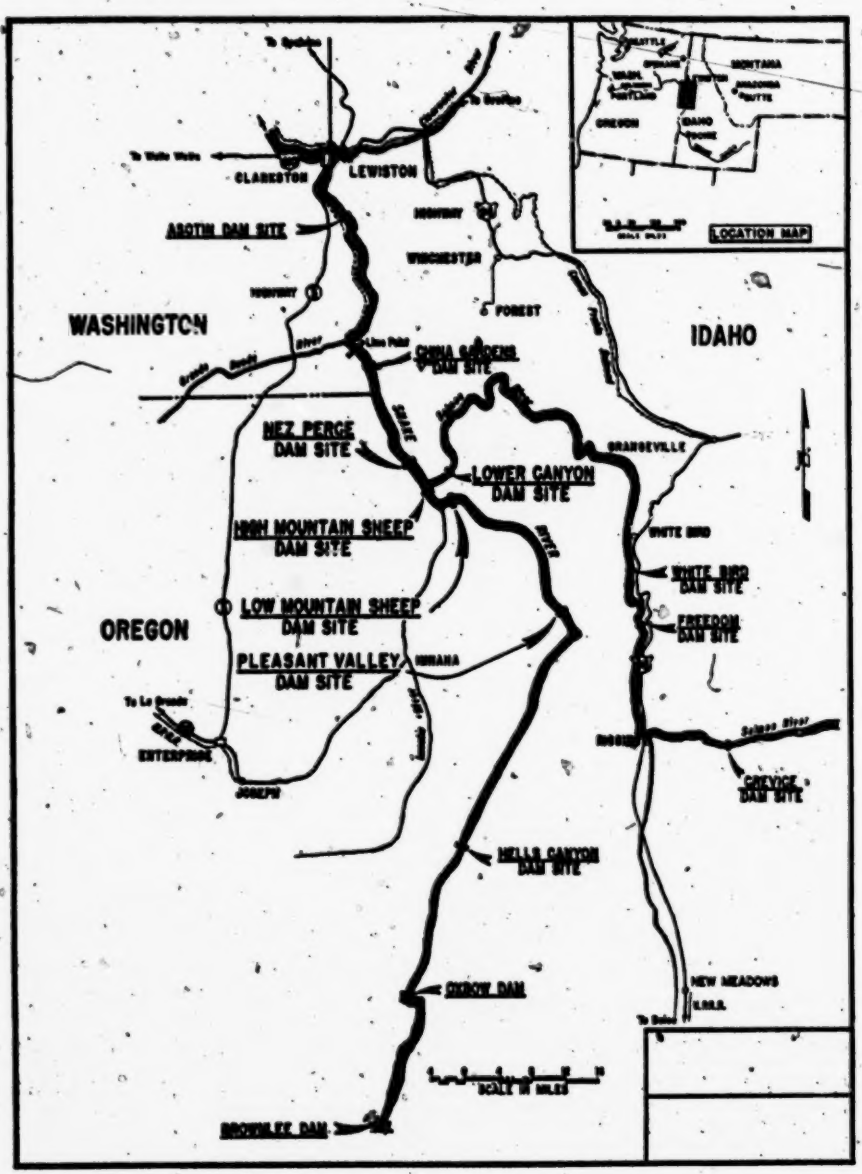
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### Question Presented

Whether the Federal Power Commission erred when it construed a preliminary permit, issued by the Commission to Pacific Northwest Power Company under Sections 4(f) and 5 of the Federal Power Act (16 U.S.C. 797(f), 798), as covering a hydroelectric development at "High Mountain Sheep" on the Snake River.

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[1] Petitioner requests that if certiorari is granted it be allowed to argue two questions in addition to those urged as grounds for certiorari. (Pet. 5, n. 5.) Petitioner does not claim that those two questions are worthy of re-

## Statement

Petitioner Washington Public Power Supply System ("Washington Supply System") seeks review of an order by respondent Federal Power Commission granting a license to respondent Pacific Northwest Power Company ("Pacific Northwest") to construct and operate a hydroelectric project at "High Mountain Sheep" on the Snake River between Oregon and Idaho. In outline, the relevant facts—which we detail later—are as follows:

For years it has been recognized that a dam on the Snake River in the vicinity of its confluence with the Salmon River would be desirable in order to develop the power resources of the Snake from that approximate location upstream about 60 miles to the hydroelectric facility at Hells Canyon. The principal controversy has been whether the dam on the Snake should be placed above or below the Salmon. From the time that serious study of the problem got underway, every interested governmental agency and conservation group advocated positioning the dam above the Salmon so that the important fish resources of that river would not be impaired. On the other hand, certain public power organizations, including the predecessors in interest of Washington Supply System, urged that a dam below the Salmon would produce overriding power benefits.

Pacific Northwest in 1954 applied to the Commission for a preliminary permit so that it could explore the matter thoroughly. On the basis of its preliminary investigation, Pacific Northwest had concluded that the damage to fish migration that might be produced by a facility below the Salmon was a very serious problem indeed, and that

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view in their own right and does not discuss them. Accordingly, we do not analyze those questions either. We submit, however, that they were rightly decided below for the reasons stated in the Commission's opinions (Pet. App. B, pp. 56a-59a; App. C, p. 136a), and in the Court of Appeals' opinion (Pet. App. A, p. 14a).

such a site did not promise countervailing advantages in terms of power and storage. In addition, as among the possible sites above the Salmon, Pacific Northwest was moved by the conviction of conservation groups that the fish resources of a small tributary of the Snake, the Imnaha, which flows into the Snake just above the Salmon, also deserved protection. In consequence, in its application for a permit, Pacific Northwest designated as the probable location of the facility a point close to, but above, the confluence of the Snake with the Salmon and with the Imnaha. Moreover, since the most recent governmental study had indicated the desirability of a two-dam facility, Pacific Northwest described that type of project in its application.

The predecessors in interest of Washington Supply System opposed Pacific Northwest's application on the ground that the dam should be located below the Salmon, but the permit was granted. While the permit described the two-dam facility, it also required Pacific Northwest to conduct a thorough investigation, in consultation with interested governmental agencies, so that the project ultimately licensed would be that best adapted to development of this portion of the river.

Pacific Northwest thereafter applied for a license on the two-dam project, but the Commission denied the license on the ground that a location below the Salmon was preferable. The Commission believed the fish problem could be solved and concluded that the power advantages of a downstream dam therefore were decisive.

The three-year period of the permit not having expired, Pacific Northwest filed another application. It did not, however, take the easy course of adapting its views to the Commission's, for its thorough investigation convinced it that the fish problem on the Salmon could not be solved effectively. However, Pacific Northwest had concluded that a single high dam could be built at a site on the Snake

between the Imnaha and the Salmon—"High Mountain Sheep"—and that, because of the special characteristics of the Imnaha, the fish problem on that river could be solved. Accordingly, Pacific Northwest applied for a license for a High Mountain Sheep project.

Two years later, Washington Supply System, maintaining its opposition to any site above the Salmon, applied for a license for a downstream site at Nez Perce. Since the two sites were, of course, mutually exclusive, a lengthy comparative hearing was held. However, after the bulk of the evidence was in, Washington Supply System finally appreciated the force of Pacific Northwest's case for High Mountain Sheep and filed an alternative application for that project, asserting that it had a preference as a public body.

The Commission awarded a license for a High Mountain Sheep project to Pacific Northwest, concluding that probable damage to fish resources outweighed any marginal advantages the Nez Perce site might have over High Mountain Sheep. It thus reversed the view it had taken in rejecting Pacific Northwest's prior two-dam application and commended Pacific Northwest for adhering to its convictions. As for Washington Supply System's claim that it should be preferred for High Mountain Sheep, the Commission held that Pacific Northwest had priority because of its preliminary permit. The Commission construed that permit to include, not merely the project provisionally described therein, but also High Mountain Sheep, which was designed to develop substantially the same portion of the river upstream to Hells Canyon. The Commission concluded that Pacific Northwest's application for permit had put Washington Supply System on notice that, if it wished to secure a license for any project that would develop that portion of the river, it had to assert its preference at that point and not wait until the permittee had expended millions of dollars in formulating project plans.

Washington Supply System does not ask this Court to review the Commission's conclusion that Washington Supply System was wrong and Pacific Northwest was right on the issue that for years had divided them—whether the dam should be placed above or below the Salmon. Rather, Washington Supply System maintains that the Commission's construction of Pacific Northwest's permit was erroneous and that Washington Supply System should have been authorized to construct the facility it had so long opposed.

In more detail, the facts are these:

1. *Events prior to Pacific Northwest's application for preliminary permit.* The Snake River flows along the boundary between Idaho and Oregon through a canyon known as the Grand Canyon of the Snake, which contains an unusual number of sites for major hydroelectric works. The development of the lower portion of the canyon, from the Hells Canyon site downstream about 60 miles to the confluence of the Salmon River and the Snake, is the subject of the present proceedings. Clustered together in the last eight miles at the lower end of the canyon are several potential locations for dams. Some of the locations are downstream from the Salmon and are called, collectively, Nez Perce. Additional locations are above the Salmon but below the Imnaha, a small stream with a small salmon fishery, and more locations are above the Imnaha. The locations above the Salmon are all called Mountain Sheep. (See S. Doc. No. 51, 84th Cong., 2d Sess.)

The comprehensive development of the Snake River basin ultimately requires construction of a dam somewhere in the vicinity of the Snake's confluence with the Salmon. (See H.R. Doc. No. 531, 81st Cong., 2d Sess.) The major consideration affecting the choice of a particular location for the dam has been its probable effect on fish—in particu-

lar fish which migrate along the Salmon. The Salmon is the source of the most important runs of Columbia River anadromous fish—chinook salmon, blueback, and steelhead—fish which are spawned in the high headwaters of tributary fresh-water streams, migrate to the Pacific, and return as adults to their natal streams to spawn. (Pet. App. B, pp. 36a-38a.) Existing techniques of fish passage are such that these Salmon River fish might be destroyed if a high dam blocked their route of migration. (Pet. App. B, pp. 43a-44a.)

Consequently, every state or federal agency that has examined the matter has found that if these fish are to be preserved, any high dam on the Middle Snake should be built upstream from the Salmon—*i.e.*, at the Mountain Sheep locations. Thus, in 1949 in the first definitive report on the Middle Snake, the Corps of Engineers recommended that if fish passage had not been solved by the time of construction, development should be "at Mountain Sheep site just upstream from the mouth of the Salmon River in lieu of Nez Perce site. . . ." (H.R. Doc. No. 531, 81st Cong., 2d Sess., vol. 4, p. 1491). Then, during a further study in 1951 by the Corps of Engineers, conservation groups in the Pacific Northwest recommended moving the project to the Mountain Sheep locations above the Imnaha, to preserve that stream's fish too. In October 1954, the Corps and the Bureau of Reclamation expressed agreement with the conservationists' recommendation, but finding that it might not be geologically feasible to build a high dam above the Imnaha, recommended construction of a somewhat lower dam at Mountain Sheep and a second dam at Pleasant Valley, a number of miles upstream, to develop the remaining portion of the Snake below Hells Canyon. (S. Doc. No. 51, 84th Cong., 2d Sess.)

2. *Pacific Northwest's application for permit.* At this point, in November 1954, Pacific Northwest applied for a

preliminary permit under Sections 4(f) and 5 of the Federal Power Act (16 U.S.C. 797(f), 798) to enable it to undertake its own investigation of the Middle Snake. (J.A. 141-150.)[2] The application, and the permit which the Commission issued, provisionally described the structures suggested in the reconnaissance studies by the Corps and the Bureau—two dams, the lower 3.4 miles above the dam that eventually was licensed, with the two reservoirs extending back 55 miles to the Hell's Canyon dam site. (Pet. App. A, p. 5a; App. E, p. 154a; J.A. 143-144, 149-150.) However, the permit provided also that a license would be issued only for a project which, in the judgment of the Commission, would "be best adapted to a comprehensive plan for the improvement and utilization of the site for purposes of navigation, of water-power development, and for other beneficial public uses, including recreational purposes," as required by Section 10(a) of the Act (16 U.S.C. 803(a)). (Pet. App. E, p. 157a; App. F, p. 161a.) And six articles in the permit required Pacific Northwest "to cooperate with various federal, state and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed." (Pet. App. B, pp. 51a-52a.)

As required by Section 4(f) of the Act, notice of Pacific Northwest's application was given to non-federal public agencies "likely to be interested in or affected by [the] application"—agencies which would have been entitled to assert a preference under Section 7(a) of the Act (16 U.S.C. 800) had they then applied for a permit. (Pet. App. B, p. 76a; App. D, pp. 152a-153a.) A predecessor in interest of Washington Supply System, the Northwest Public Power Association, protested the application (Pet. App. C, pp. 140a-141a), but no public agency saw fit to assert the preference and apply for a permit, and thus to assume the

[2] "J.A" references are to the Joint Appendix in the court below.

burden and expense of the investigation required to plan a project which would be "best adapted to a comprehensive plan" for development of the Middle Snake. Accordingly, the Commission issued the preliminary permit to Pacific Northwest (Pet. App. E, pp. 153a-159a), and as required by the terms of the permit, Pacific Northwest undertook the necessary investigations.

3. *The first license proceeding.* Pacific Northwest's investigations and engineering prior to its first application for a license were not confined to the specific locations and structures provisionally described in its permit. Pacific Northwest considered the Mountain Sheep locations below the Imnaha, but agreed with the Corps and the Bureau that the public interest in proper protection of fish indicated development above the Imnaha. (J.A. 213.) Pacific Northwest also conducted extensive geological exploration of the possibility of a single dam above the Imnaha at three different locations, but the results of the studies were adverse. (Pet. App. B, p. 57a; J.A. 213.) Accordingly, in September 1955, Pacific Northwest applied for a license for the two-dam Mountain Sheep-Pleasant Valley development. (Pet. App. A, p. 6a.)

The National Hells Canyon Association and the Northwest Public Power Association, Washington Supply System's predecessors in interest in these proceedings (J.A. 718; Pet. App. C, p. 140a), intervened to advocate federal construction of a high dam at Nez Perce. At the conclusion of the hearings, the Commission concluded that a high dam at Nez Perce would provide greater power and flood control benefits than would Mountain Sheep-Pleasant Valley, and that the fishery resources of the Salmon River could be preserved, notwithstanding the construction of a high dam at Nez Perce, through use of as yet untested fish passage facilities similar to those then under construction elsewhere. Accordingly, the Commission denied Pacific

Northwest's license application. *Pacific Northwest Power Co.*, 19 F.P.C. 127 (1958).

4. *The High Mountain Sheep-Nez Perce license proceeding.* Because a dam at one of the Mountain Sheep locations below the Imnaha but above the Salmon and Nez Perce—*i.e.*, at the site which Pacific Northwest eventually dubbed "High Mountain Sheep"—would interfere with fish migrating to and from the Imnaha, a fact which seemed to Pacific Northwest to justify the Mountain Sheep-Pleasant Valley alternative, the potential of a development at "High Mountain Sheep" had not been presented to the Commission on the record. However, while its Mountain Sheep-Pleasant Valley application was pending before the Commission, Pacific Northwest undertook general site investigations and surveyed and designed a dam for the present High Mountain Sheep location. (J.A. 7-8.) Pacific Northwest knew, therefore, that as a part of a comprehensive development plan, High Mountain Sheep would be superior to Nez Perce in potential flood control and power benefits. And Pacific Northwest did not agree with the Commission's optimistic view that a high dam could be built at Nez Perce without destroying the Salmon River's fish. Consequently, on March 31, 1958, within the three-year term of its preliminary permit, Pacific Northwest applied for a license to construct a dam at High Mountain Sheep. (Pet. App. B, pp. 57a-59a.) The soundness of Pacific Northwest's judgment in this regard was later confirmed by the Corps (H.R. Doc. No. 403, 87th Cong., 2d Sess.), by the State Water Resources Board of Oregon (J.A. 5-6), and by the Department of the Interior (J.A. 309-313), all of which concluded that the resources of the Middle Snake should be developed above the Salmon, not below.

The Northwest Public Power Association and the Hells Canyon Association again intervened, objected to High Mountain Sheep on the same grounds asserted against

Mountain Sheep-Pleasant Valley, and urged federal construction of Nez Perce. But from March 1958, when Pacific Northwest filed its High Mountain Sheep application, through March 1960, Washington Supply System evidenced no interest whatever in obtaining any license. It was not until five days before the hearings on Pacific Northwest's proposal were scheduled to start that Washington Supply System, acting for the National Hells Canyon Association and the Northwest Public Power Association and asserting that its only interest was to protect the allegedly superior development possibilities at Nez Perce, filed a license application specifying Nez Perce as the site for the dam. (J.A. 2-4, 329-330.) The proceedings on the two conflicting applications were then consolidated by the Commission. (J.A. 258.)

The hearings commenced in November 1960 and continued to April 1961, Pacific Northwest making its case for High Mountain Sheep and Washington Supply System making its case for Nez Perce. At that point, in April 1961, six years after Pacific Northwest had secured its preliminary permit and three years after Pacific Northwest had proposed location of the dam at High Mountain Sheep, Washington Supply System again changed position, announcing that it would demand that it be granted a license for High Mountain Sheep if Nez Perce were rejected as not "best adapted." Accordingly, it moved to amend its license application to include plans for a High Mountain Sheep project. (J.A. 284-288.)

5. *The examiner's decision.* In October 1962, the examiner rendered his decision. (J.A. 315-491.) He found that High Mountain Sheep was best adapted to a "comprehensive plan of development for this reach of the river under the standards established by Section 10(a) of the Act" because the High Mountain Sheep plan would pro-

vide more power and greater flood control benefits and would interfere less with the preservation of anadromous fish runs than would the Nez Perce plan. (J.A. 460.) He concluded that High Mountain Sheep was within the scope of Pacific Northwest's preliminary permit, and consequently that Pacific Northwest had a statutory priority for a license for the project. (J.A. 410-418, 460.) Further, he held that the evidence demonstrated that federal development should not be recommended. (J.A. 426-443.) Accordingly, the examiner ordered the issuance of a license to Pacific Northwest, subject to review by the Commission. (J.A. 461.)

6. *The Commission's decision.* The Commission issued its Opinion and Order on February 5, 1964. In the opinion, the Commission expressed substantial agreement with the examiner's conclusions. First, it considered which of the two projects—High Mountain Sheep or Nez Perce—met the "best adapted" requirement of Section 10(a) of the Act, concluding unanimously that High Mountain Sheep was the better plan. (Pet. App. B, pp. 21a-47a.) The Commission found that its earlier opinion about successful fish passage was unjustified and thus the decisive consideration was the fact that Nez Perce would jeopardize the anadromous fish resources of the Salmon River while a dam above the Salmon would not—as Pacific Northwest had contended from the beginning.[3] (Pet. App. B, pp. 36a-46a.)

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[3] In this connection, the Commission observed: "As a matter of fact, [Pacific Northwest] is to be commended for sticking with its concept regarding the proper development of the Snake. With the issuance of the Commission's opinion on January 20, 1958, indicating its conclusion that Nez Perce represented the best development of this reach of the Snake, it would have been an easy matter for [Pacific Northwest] to have promptly filed a license application specifying this site. This it did not do. Rather, it insisted that any proposal which would block the Salmon River was not best adapted to comprehensive development. While equitable considerations are not relevant to determining the scope of a preliminary permit, we are

Next, the Commission turned to the question whether a license, if issued, should be granted to Pacific Northwest or to Washington Supply System. Under Section 7(a) of the Act, the Commission must give preference to applications by States and municipalities for licenses "where no preliminary permit has been issued" if the public agency's plans can "be made equally well adapted" and the agency otherwise qualifies for the statutory preference. On the other hand, where a preliminary permit has been issued, those provisions of Section 7(a) are inapplicable by their terms, and instead the permittee has a statutory priority to a license under Section 5 of the Act. Accordingly, the Commission stated, "[a]s between the applicants, the initial question is a legal one, i.e., whether [Pacific Northwest] has a priority under its preliminary permit." (Pet. App. B, p. 47a.)

Whether Pacific Northwest had a priority under its permit depended, of course, upon the scope of the permit—*i.e.*, upon whether the permit was construed as covering High Mountain Sheep. The Commission so construed it. Turning first to the statute, the Commission noted that "[a] preliminary permit is issued under Section 4(f) of the Act to enable an applicant for a license to make studies and gather data and at the same time under Section 5 to maintain its priority of application. . . . The statute . . . clearly contemplates that proposals and plans made at the time the permit was issued may be changed as a result of investigations made by the permittee. At the same time the permittee is protected by the permit from rival applicants while incurring expenses in the investigation of a project intended and required by Section 10(a) to be best

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nevertheless constrained to observe the irony involved in rejecting [Pacific Northwest's] proposal to develop the Snake when its [High Mountain Sheep] application would promptly have been granted had the Commission properly analyzed the relative merits of a Nez Perce project." (Pet. App. B, p. 59a.)

adapted to a comprehensive development of the reach of the river involved." (Pet App. B, pp. 48a-49a.)

Accordingly, the Commission concluded that the purpose of the statutory provisions "is to give a permittee the first right to develop that reach of a river to which the permit relates. Any other interpretation would make the permit meaningless, for if another party could obtain a permit or apply for a license for a nearby project that would develop substantially the same head as the one described in the original permit, there would be no protection to the first permittee." (Pet. App. B, p. 49a.) The Commission continued:

> "To interpret the priority afforded by a permit as limited to a single project would also be contrary to the two most significant objectives of the Act, namely, to encourage the development of our nation's water resources, and to insure that such development would be best adapted to the fullest use of the river, considering all uses. Who would be willing to undertake substantial and expensive investigations looking toward development of a river if a permit were good only in the event—the unlikely event—that the results of the investigations coincided precisely with the permittee's guesstimate at the time the permit application was filed? In this connection, it is the experience of the Commission that a project is rarely constructed at the same exact site and in the same fashion as originally contemplated. Indeed, we are unaware of a single instance where this is true. . . .
>
> "If priority extended only to that project described in a permit, the pressure would be great upon the permittee not to explore fully alternative projects which might be superior. Clearly, if such investigations were conducted and an alternative development were considered preferable, the first permittee would be in

danger of losing its opportunity to develop needed generating capacity as a result of its own actions. Thus, a narrow interpretation of the priority provisions would serve to undermine the objectives of Section 10(a) of the Act which is designed to insure the optimum development of our water resources." (Pet. App. B, pp. 50a-51a.)

The Commission then analyzed the terms of Pacific Northwest's permit and concluded that it was intended to be the type of permit contemplated by the Act and should be so construed (Pet. App. B, pp. 51a-52a):

"In view of the incongruity of a narrow interpretation of the priority afforded by a permit with the fundamental objectives of the Act, as well as the specific provisions on priority itself, it would require a compelling showing to convince us that [Pacific Northwest's] preliminary permit is of no effect respecting [Pacific Northwest's High Mountain Sheep] license application. To the contrary, we view the numerous terms of [Pacific Northwest's] permit as describing that type of permit contemplated by the Act.

"There are six specific articles in the permit which required [Pacific Northwest] to cooperate with various federal, state and other interested agencies for the purpose of evolving the best development of the Snake, irrespective of the detailed description of the project as tentatively proposed. Article 10 required [Pacific Northwest] to cooperate with the U.S. Forest Service to develop a plan for alleviating damage to and achieving maximum utilization of National Forest resources. In Articles 11 and 12, the permittee was obliged to negotiate and cooperate with the U.S. Fish and Wildlife Service and various commissions of the states of Idaho and Oregon in formulating measures in the interest of fish and wildlife conservation. Article 13 required

> [Pacific Northwest] to cooperate with enumerated State departments and commissions and with the U.S. Forest Service regarding the recreational phases of the project. [Pacific Northwest] was required by Article 14 to cooperate with the Bureau of Mines concerning mineral resource possibilities. *Most importantly, Article 15 required [Pacific Northwest] to cooperate with the Corps of Engineers and the Bureau of Reclamation '* * * with the object of determining a plan of development for the two sites best adapted to a comprehensive plan of development of the water resources of the Snake River.' To adopt a narrow interpretation of the permit would be anomalous in that [Pacific Northwest] would be required to develop the best plan of development when it would thereby lose its priority to carry out the development.''* (Emphasis added.)

The permit described the project for which priority was given in general terms of its location within certain counties in Idaho and Oregon. (Pet. App. E, p. 153a.) To be sure, in a subsequent paragraph the permit recited that "[a]s described in the application, the proposed project would consist of" the Mountain Sheep and Pleasant Valley developments, the locations of which were set forth. (Pet. App. E, p. 154a.) However, the Commission stated that its regulations required an exact description of the boundaries of a project provisionally proposed in a permit application not for the purpose of limiting the geographical scope of the permit, but only to insure "a sensible program of land withdrawals" under Section 24 of the Act.[4] (Pet. App. B, p. 53a.)

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[4] Section 21 of the Power Act (16 U.S.C. 814) provides for condemnation of land needed for a licensed project and just compensation therefor. To prevent private acquisition of public lands for the purpose of speculation under the eminent domain provision of the Act, to the subsequent prejudice of a licensee, Section 24 of the Act (16 U.S.C. 818) provides for the reservation from entry, location or other disposal of public lands

In consequence, the Commission construed Pacific Northwest's permit as covering not only the two dams and the 55 miles of reservoir below Hells Canyon provisionally described in the permit application, but also mutually exclusive alternatives for developing substantially the same head and essentially the same reach (Pet. App. B, p. 49a)—*i.e.*, as covering a dam at High Mountain Sheep and 58 miles of reservoir below Hells Canyon. That construction of the permit, the Commission noted, was in accordance with its previous decision in the *Montana Power* case, 17 F.P.C. 834 (1957), construing a preliminary permit containing identi-

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on which projects for which permits or licenses are sought would be located. The Commission stated that its regulations required specificity in permit applications only to prevent excessive withdrawals of land under Section 24:

> "[Washington Supply System] emphasizes that language in paragraph (A) of [Pacific Northwest's] permit, i.e., 'This preliminary permit is issued * * * for the sole purpose of maintaining priority of application for a license for Project No. 2173 ** *.' However, the specificity in applications for permits required by our regulations arose from the necessity of limiting unnecessary reservations of land for power purposes to the detriment of the public. The legislative history of the Water Power Act evidences a grave concern with undue reservations of public lands for such purposes. It was for this reason that our regulations were designed to provide a detailed description of the lands occupied by the project. While it is not possible to achieve these desired results in every case, as here, we do not view those situations as adequate justification for abandoning our attempts to insure a sensible program of land withdrawals. Thus, as stated above, our regulations governing the filing of applications for preliminary permits require the specification and the location not only of the lands to be used but also of the major project works. Any application for a permit failing to contain the required specificity would be rejected under our Rules. Section 4.81 of our regulations under the Federal Power Act which specifically deals with the filing of applications for preliminary permits, as well as Section 1.14(a) of our Rules of Practice and Procedure, specifically provide for such rejection.
>
> "While the detailed description of site in both the application and in the resulting permit enables a sensible program of land withdrawals, we do not believe that this aspect should be or is controlling with respect to the scope of a permit." (Pet. App. B, pp. 52a-54a.)

cal language.[5] (Pet. App. B, pp. 54a-56a.) As to Washington Supply System's contention that it had been deprived of notice, the Commission held that Washington Supply System "was never really misled or deprived of notice. To the contrary, [Washington Supply System] knew exactly what was going on, but apparently had to change horses in midstream." (Pet. App. C, p. 141a.) Consequently, the Commission held that Pacific Northwest was "entitled to priority for its application to develop" High Mountain Sheep, and that the preference provisions of Section 7(a) were "not applicable" to Washington Supply System's application. (Pet. App. B, p. 60a.) The Commis-

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[5] "The scope of a preliminary permit containing language identical to that in [Pacific Northwest's] permit was specifically considered in the *Montana* case. Montana was the permittee for proposed Project No. 2164 (at mile 36.4) and 2163 (at mile 60.7) on the Flathead River. Previously, Montana had been issued a permit for Project No. 2135 at mile 68.6. Project No. 2163, if constructed would have inundated Project No. 2135. Subsequently, Montana filed for a fourth permit, identified as Project No. 2223. If constructed, this project would develop the same reach of the river as Projects Nos. 2163 and 2164. On January 8, 1957, the Confederated Salish and Kootenai Tribes filed an appearance in opposition to Montana's application for a permit for Project 2223. They characterized that application as an attempt to secure an unlawful priority to apply for a license. The Secretary of the Commission had previously requested additional support for the grant of the permit since it appeared that Montana's existing permits enabled it to conduct the necessary studies regarding Project 2223. In response, Montana agreed that the same reach of the river was involved in its existing permits as was covered by Project 2223. Nevertheless, it pointed out that proposed Project 2223 was substantially different from the projects contemplated under permits 2135, 2163 and 2164 and went on to describe some of these major differences. Nevertheless, the Commission denied the application for a permit for Project 2223 as unnecessary. That order carefully explains that the amendment was denied because the examinations, surveys and other acts, the performance of which is contemplated under a preliminary permit could be made with respect to Project 2223 under the outstanding preliminary permits for Projects 2163 and 2164. The Commission made this finding notwithstanding the different identification numbers assigned to the two proposals. The holding in this contested proceeding cannot be reconciled with the minority's position." (Pet. App. B, pp. 54a-56a.)

sion then determined that federal development of High Mountain Sheep was not warranted and accordingly granted a license to Pacific Northwest. (Pet. App. B, pp. 69a-86a.)

On rehearing, the Commission modified its original order with respect to certain minor details (see pp. 25-26, *infra*) but otherwise reaffirmed its earlier decision. (Pet. App. C, pp. 129a-148a.) The Court of Appeals has reviewed and affirmed the Commission's decision. For reasons stated below, there is no occasion for further review by this Court.

## Argument

Petitioner Washington Supply System does not claim that the decision below conflicts with other lower court decisions. It does contend, however, that the Commission and the Court of Appeals have decided an important question of federal law that should be finally settled by this Court (Pet. 12-20) and that the decision below conflicts with prior decisions by this Court. (Pet. 21-29.) Neither contention has any merit.

A. *The case presents no important question of federal law.* On its face, this case involves only the question whether the Court of Appeals erred in accepting the Federal Power Commission's interpretation of its own permit. Such an issue would not normally be an appropriate subject for review by this Court. Petitioner, however, says that there are important underlying statutory issues—that the lower court "reject[ed] the Federal Power Act's mandate to prefer the license applications of public agencies," and that this "presents a major federal question of first impression." (Pet. 12.) That contention is without substance. As we show below, the case presents no genuine questions whatever with respect to the policy or interpretation of the relevant Power Act provisions—no questions as to the application of the public power preference provisions of

Section 7(a), or as to the permit and priority provisions of Sections 4(f) and 5, or as to the interrelation of the two.

1. In the first place, it is agreed by all concerned that the Power Act authorizes the Commission to issue permits of the kind which the Commission construed Pacific Northwest's permit to be—that is, permits covering mutually exclusive alternative sites for project works developing essentially the same water resources. After reviewing Sections 4(f), 5 and 10(a) of the Act, the Commission's majority concluded that such a permit is the "type of permit contemplated by the Act." (See pp. 12-14, *supra*.) The dissenting Commissioners, who agreed with the majority that an applicant should not be required to guess in advance of exploratory studies just what project will turn out to be "best adapted" —an "impossible demand" (Pet. App. B, p. 112a)—were of the view that there was nothing that would have prevented Pacific Northwest "from asking for a permit" which included High Mountain Sheep. (Pet. App. B, p. 120a.) The Court of Appeals determined that the Commission's decision was consistent with the statutory purpose "to afford protection to the entrepreneur willing to invest his time and money in determining exactly where and in what form to propose construction of a project which will be best adapted to a comprehensive plan for improving or developing a waterway. . . ." (Pet. App. A, p. 13a.) And in the petition for certiorari, petitioner agrees that an applicant "may apply for a permit for the investigation of all sites in a disclosed reach of the river, and, by such fair disclosure . . . obtain in advance (if the public interest justifies it) a permit which grants the options desired by the permittee." (Pet. 20.) (We discuss the matter of disclosure and notice below.) Thus the case presents no question as to the Commission's power to issue a permit like Pacific Northwest's, as the Commission construed it.

There is no dispute either that, if the Commission did

issue Pacific Northwest a permit that covered High Mountain Sheep, Pacific Northwest was entitled to a priority as against petitioner. To put it differently, there is no controversy about the basic legislative framework established by the priority and preference provisions. Section 7(a) requires the Commission to give preference to applications by states and municipalities for preliminary permits and for licenses "where no preliminary permit has been issued" if the public agency's plan can "be made equally well adapted" and the agency is otherwise qualified.[6] But where a preliminary permit *has* been issued under Section 4(f),[7] the preference provision of Section 7(a) does not apply; instead the preliminary permittee has a statutory priority to a license under Section 5.[8]

In sum, there is no dispute that under the Act the Commission had the authority to issue Pacific Northwest a permit covering High Mountain Sheep as well as Mountain Sheep-Pleasant Valley and that if it did issue such a permit

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[6] "Sec. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region. . . ."

[7] "Sec. 4. The Commission is hereby authorized and empowered . . .

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof. . . ." (Section 9 specifies requirements for license applications.)

[8] "Sec. 5. Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. . . ."

in this case Pacific Northwest was entitled to a priority and petitioner was not entitled to a preference. Thus, the only question is whether the Commission properly interpreted its permit.

2. Petitioner's principal contention is that the permit, as construed by the Commission, did not provide the notice required by Section 4(f). That contention has no foundation whatever. As the Commission correctly concluded, ample notice was given to potential applicants, including petitioner and its predecessors.[9]

a. We note preliminarily that the controversy whether notice of Pacific Northwest's application for permit was adequate does not in principle align the interests of preference applicants on one side and the interests of non-preference applicants on the other. The priority under Section 5 is an important element in accomplishing what this Court has described as a major purpose of the Act—the encouragement of non-federal investment in hydroelectric development. *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.*, 347 U.S. 239, 251. The protection a preliminary permit provides is fully as vital to public agencies as to private companies, for a public agency's investment in exploratory studies for the development of particular water resources could be jeopardized by another public agency's license application were it not for the protection secured by preliminary permits. Thus, as the Commission noted, "[t]he priority provisions were not designed to coun-

[9] Petitioner Washington Supply System is a municipal corporation created under the laws of Washington in 1957. It was requested by the Northwest Public Power Association and the National Hells Canyon Association to file an application for Nez Perce in 1960, when those bodies concluded they would be unable to induce the federal government to undertake construction. (See p. 10, *supra*.) The two bodies are considered by Washington Supply System to be its predecessors in interest. (Pet. App. C, p. 140a; J.A. 718.) For simplicity, the three bodies are collectively referred to hereafter as "petitioner".

ter-balance the preference rights of public bodies. To the contrary, the priority sections have independent significance and are not directed to the public-private power controversy. The purpose of the priority provisions is to encourage development of the nation's waterways by giving reasonable protection to a party investigating the development of a given reach of the river. . . . The priority provisions were drawn to afford protection to one who makes such investigations, *irrespective of whether the party involved is a private or public agency.*" (Pet. App. C, p. 135a, emphasis added.) Indeed, as the Commission observed, "[p]reference parties not only have an equal chance to obtain a permit but, in addition, have a preference for a permit guaranteed by Section 7(a)." (Pet. App. B, p. 60a.) In short, to the extent petitioner suggests that the Commission's decision will result in augmenting the rights of private parties at the expense of public agencies, that suggestion is in error.

b. The Commission's analysis of the notice requirement of Section 4(f) of the Act is quite sound. Under Section 4(f), when an application for a preliminary permit is filed, notice of the application is given to "any state or municipality likely to be interested in or affected by such application." Such notice was given to petitioner. (See Pet. App. B, p. 76a; App. D, pp. 152a-153a.) Had petitioner, or any other preference body, had any intentions of constructing High Mountain Sheep, it knew immediately that its potential interest was directly and immediately affected. It must then have known that if Pacific Northwest eventually received a license for the project provisionally proposed, construction at other competing sites would be precluded forever. As the Commission noted, "[o]nce a party, preference or otherwise, has a permit describing a project which would develop a specific stretch of river, everyone is on notice that the permittee has priority to construct at least

the project described in the permit. Quite clearly, this would foreclose *any* development on that stretch of the river contemplated by any other party. It is therefore inconsequential, as far as notice is concerned, if the construction plans are altered as long as the same reach of the river is involved." (Pet. App. B, p. 60a.)

Accordingly, if a public agency receiving notice of an application for a permit has ambitions to develop the reach of river to which the application relates, it knows that the time has come for it to act. That is equally true whether the agency believes that the sites provisionally described in the application are likely to be the "best adapted" sites for comprehensive development of the waterway, or believes instead that other sites would be preferable. In consequence, there is no substance in principle to petitioner's claim that the Power Commission's interpretation of Pacific Northwest's permit as covering the "reach of the river" to which the permit related somehow deprived interested public agencies of notice.

c. The facts of this case illustrate the adequacy of the notice afforded under the Commission's approach in a particularly dramatic fashion. From the very beginning the controversy as to the proper development of the Middle Snake has centered upon the choice among several alternative plans of developing the Snake from its confluence with the Salmon upstream to Hells Canyon, with the point of principal controversy being the protection of the fishing resources of the Salmon. (See pp. 5-11, *supra*.) And from the very beginning all interested parties have recognized that High Mountain Sheep, Mountain Sheep-Pleasant Valley, and Nez Perce were mutually exclusive alternatives. In particular, petitioner so recognized. As the Commission noted, "[s]ince at least 1954, [Washington Supply System] and its predecessor in interest, the Northwest Public Power Association, have actively participated in all of the proceed-

ings involving this reach for the purpose of advocating the advantages of Nez Perce over alternative sites on the Snake. At the public hearings held in Lewiston, Idaho, on the preliminary report in S.D. 51, then proposing what is now High Mountain Sheep, Mr. Gus Norwood, Executive Secretary of the Northwest Public Power Association, filed a protest because High Mountain Sheep would pre-empt Nez Perce."[10] (Pet. App. C, pp. 140a-141a.) Then when Pacific Northwest applied for a permit and notice of application was given to the public agencies, the Association protested Pacific Northwest's application on the ground that Mountain Sheep-Pleasant Valley likewise would preclude location of the project at Nez Perce. Later, the Association intervened to oppose a license for Mountain Sheep-Pleasant Valley, and then intervened in this proceeding to oppose a license for High Mountain Sheep, on the same ground. (Pet. App. C, p. 141a; Comm'n Rec. 25284.)

Thus the actions of petitioner establish, as the Commission concluded and as petitioner surely could not dispute, that petitioner has always recognized that the Mountain Sheep-Pleasant Valley, the High Mountain Sheep and the Nez Perce projects were incompatible. If petitioner or any other public agency wished to secure a license for one of these projects on the basis of a preference, it was obliged to move at the time of Pacific Northwest's application for a permit. Petitioner did not do so, not because it lacked notice but because it did not care to underwrite the costs of development and instead hoped, as the Commission noted (Pet. App. C, p. 141a), that the federal government would do so. Only when it became apparent that it could not induce the federal government to construct the project did petitioner

[10] S. Doc. No. 51, 84th Cong., 2d Sess., was a joint report by the Corps of Engineers and the Bureau of Reclamation on their studies of the Middle Snake River.

finally apply for a license, and even then its purpose was not so much to acquire a license as to insure that any project constructed would be located at Nez Perce rather than at High Mountain Sheep. (Pet. App. C, p. 141a.) Thus, as the Commission pointed out, the managing director of petitioner testified before the examiner: "I am sure [that] had [Pacific Northwest] . . . seen fit to make a filing on the Nez Perce project, in my opinion the public agencies wouldn't have made a filing on the Nez Perce project." (Pet. App. C, p. 141a.) In short, as the Commission concluded, petitioner "was never really misled or deprived of notice. To the contrary, [it] knew exactly what was going on . . . ." (Pet. App. C, p. 141a.)

3. While not literally asserting the alleged grievance as a separate ground for certiorari, petitioner repeatedly claims that its "superior" project has been licensed to Pacific Northwest. (Pet. 2, 3, 5, 10-11, 14, 18.) The Commission's opinions demonstrate that this assertion is simply not true.

Petitioner does not dispute that, in its first opinion and order, the Commission licensed the physical project that Pacific Northwest had proposed, not the one that petitioner proposed some two years after Pacific Northwest's application. (Pet. App. B, pp. 77a-79a.) On petition for rehearing, the Commission made certain tentative modifications in Pacific Northwest's license changing the number of generators to be installed initially and their kw rating. (Pet. App. C, pp. 144a, 147a.) While these changes were in accord with petitioner's proposal, they also were in accord with Pacific Northwest's statement on the record that it would incorporate larger units in final design. (Comm'n Rec. 9956.) But the critical consideration is that, as is abundantly clear from the Commission's discussion of the matter, the Commission did not think that it was "substituting" petitioner's design for Pacific

Northwest's or that petitioner's design was superior. Rather, as the Commission pointed out, it was simply making a tentative determination respecting a highly technical subject—which turns upon such matters as plant factor, system load factor, load growth, peaking capacity available, and transmission capability—that is not related to comparative merit of design and that will be fully resolved only at final design.[11] (Pet. App. B, pp. 47a, 144a.)

4. Finally, the Commission's decision, which was based upon considerations calling into play the Commission's expertise, was reasonable. In exercising its unquestioned statutory authority to prescribe the form in which preliminary permits should be issued, the Commission has decided not to require the designation of every possible project that might be an alternative means of developing a particular reach of a river because this would result in unnecessary withdrawal of public lands. On the other hand, the form of permit provides, as the Commission reads it, a priority extending beyond the project tentatively described in the permit in order to promote the statutory policy of

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[11] Thus, in its initial opinion the Commission concluded that the "differences in construction features" between the two plans were not "decisive because the plans are not final" (Pet. App. B, p. 47a); and in its opinion on rehearing, in the passage immediately preceding the one quoted by petitioner (Pet. 11) but not adverted to by petitioner, the Commission stated:

> "[T]he differences between the two proposals are of such a technical engineering nature that they must await the submission of final plans. It is impossible at this point to determine the precise nature of the project which will eventually be constructed at [High Mountain Sheep]. We recognized this situation in our decision. On page 252, we stated that a complete geological study carried out by a more elaborate program of borings is required before construction can be authorized at any [High Mountain Sheep] site. On page 255 we noted that final plans may differ from what we characterized as the estimates submitted herein. We therefore specifically refused to find that the data submitted respecting these plans precisely represent the ultimate development of either plan. In order to assure that the complete potential of this reach of the river is fully developed by [Pacific Northwest], *i.e.*, that development required by Section 10(a) of the Act, we specifically included Articles 39 through 44 in the license." (Pet. App. C, p. 144a.)

encouraging the full exploration of alternative approaches to the basic water resources development proposed by the permittee. That the form does so provide is demonstrated by long and consistent administrative practice—the Commission found that not once in the history of the Act has a license application been made that corresponded to the permit application. (See p. 13, *supra*). Further, the Commission's decision followed its previous decision in the *Montana Power* case, construing the same language in a preliminary permit. (See p. 17, n. 5, *supra*.)

The Commission also found that the type of permit issued to Pacific Northwest gives adequate notice to public bodies who might want to develop the resources in question. The Commission is aware of the practice of the industry and of the attention that interested public bodies pay to hydroelectric projects from their inception. Certainly the Commission's opinion reflects no inclination to undercut the notice requirement, and the reasonableness of its approach is supported by the facts of this case in which petitioner received ample notice.

In these circumstances, there is no occasion to interfere with the Commission, certainly not at this point and certainly not in this case. The fact that this is a case of "first impression," in the sense that this is the first time a competing applicant has contended that a permit must be restricted to the structures and the site provisionally described therein, is a reason for denying review, not for granting it; for the lack of precedent for such a challenge in the 44 years of experience under the Act suggests the correctness of the Commission's view as to the adequacy of notice provided under the established system of permits. Despite the teaching of the past, petitioner warns that public bodies, fearful of drastic impairment of their preference rights, will engage in a stampede for permits and thrust entire waterways into "deep freeze." (Pet. 18-19.) Should

this, or any of petitioner's other extravagant predictions, materialize—and the Commission is convinced that they will not (see Pet. App. C, pp. 137a-138a)—surely there is no basis for thinking that the Commission would be so insensible of its obligations that it would refrain from taking corrective action. All that would be required under petitioner's own analysis would be a change in Commission regulations prescribing the form of permit applications.

In short, the Commission's decision is reasonable in principle, it is reasonable as applied to the facts of this case, and there is no ground for thinking the Commission will apply the decision in unreasonable fashion in the future.

B. *There are no conflicts between the decision below and prior decisions by this Court.* Petitioner also claims that the decision below departs from the principles of certain decisions by this Court. (Pet. 21-29.) That is not the case.

1. Petitioner contends first that the decision below "conflicts" with decisions of this Court construing grants of privileges in public lands and navigable waters. (Pet. 21, n. 2.) There is nothing instructive in the decisions in question. Whatever the situation may be with respect to other statutes and other kinds of government licenses, the bases for the Commission's interpretation of Pacific Northwest's permit speak for themselves. (See pp. 11-17, *supra.*)

We note that in this connection petitioner claims that "if this decision becomes law, it appears impossible for the Commission to lawfully restrict a permit's benefits to its boundaries, no matter how strictly it defines those boundaries." (Pet. 21.) That is patent nonsense. Neither the Commission nor the court below held that Pacific Northwest acquired benefits outside the boundaries defined in the

permit; they held that High Mountain Sheep was *within* the scope of the permit. (See pp. 14-15, *supra;* Pet. App. A, pp. 5a, 8a, 14a; App. B, pp. 48a-60a.)

2. Also, petitioner claims that the decision below conflicts with holdings by this Court that an administrative agency may not violate its own regulations. (Pet. 27, n. 8.) In this connection, its claim is that Power Commission regulations required Pacific Northwest to obtain an amendment of its permit before seeking a license. However, the arguments as to the need for amendments were thoroughly canvassed by the Commission and were rejected by a majority of the Commissioners.[12] The Commission's decision in that regard followed its previous decision in the *Montana Power* case, which held that an amendment will be denied when the applicant seeks only to substitute for the project provisionally described in his permit a better adapted project for developing essentially the same resources.[13] (See p. 17, n. 5, *supra.*) And on its face, the regu-

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[12] The two dissenting commissioners agreed with the Commission that in view of the purposes of the relevant statutory provisions, the Commission should not hold parties to a guess, made in advance of exploratory studies, as to just what projects on a particular stretch of river would eventually prove to be "best adapted" to a comprehensive plan of development of the water resources involved. (Pet. App. B, p. 112a.) The dissenters felt, however, that a permit should be construed to cover only the project which it provisionally describes, and that necessary "flexibility" could be achieved through subsequent amendments of the permit. (Pet. App. B, pp. 112a-113a; App. C, pp. 148a-149a). However, as the majority of the Commission noted, "[t]he minority's solution, i.e., filing of amendments to permits is incomplete because the all-important question remains: Does a party having a permit have a right to an amendment to the permit for a project concerning the same stretch of the river? . . . If [the dissenters] answer negatively their solution is frustrating and fatuous since it would encourage parties to perform useless activities. If they answer affirmatively, they are simply imposing additional filing requirements of no substance, since, in effect, a party obtains priority to a given stretch of the river under the original permit." (Pet. App. B, pp. 59a-60a; see also App. C, pp. 139a-140a.)

[13] In view of the long and consistent administrative practice and the 1957 *Montana Power* decision (Montana Power is one of the four companies that organized Pacific Northwest), it was clear, in March of 1958, that an appli-

lation on which the petitioner relies does not purport to say *when* an amendment is required; it provides only the procedure to be followed *if* an amendment is sought.[14] Thus, the issue as to the Commission's amendment regulation involves no question of "violation" but rather a question of interpretation. Such questions are for the Commission, not for the courts. The decisions cited by petitioner have no relevance to the issue.

## Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HUGH SMITH
1400 Public Service Building
Portland, Oregon

FRANCIS M. SHEA
WILLIAM H. DEMPSEY, JR.
RALPH J. MOORE, JR.
JOHN R. KRAMER
734 Fifteenth Street, N.W.
Washington, D.C.

*Attorneys for respondent*
*Pacific Northwest Power Company*

*Of Counsel:*

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C.

RIVES & RODGERS
1400 Public Service Building
Portland, Oregon

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cation for an amendment, such as petitioner and the dissenting Commissioners say Pacific Northwest should have filed, would have been rejected by the Commission.

[14] "Applications for amendments of preliminary permits shall follow the form prescribed for original applications, as far as applicable. If an application for an amendment embraces sites or areas not covered by the original permit, notice of such application will be given in the manner required for the original application. . . ." 18 C.F.R. 4.84.